IN THE HIGH COURT OF DELHI AT NEW DELHI

W.P.(C)14164/2006

SCHNEIDER ELECTRIC INDIA PRIVATE LIMITED .... Petitioner through Mr. V. Lakshmi Kumaran with Mr. M.P. Devnath, Advs.

Versus

GOVERNMENT OF NCT OF DELHI ...Respondent through Mr. H.L. Taneja, Adv.

Date of Hearing : January 18, 2007

Date of Decision : February 15, 2007

CORAM:
HON'BLE MR. JUSTICE VIKRAMAJIT SEN
HON'BLE MR. JUSTICE J.P. SINGH

1. Whether reporters of local papers may be allowed to see the Judgment? Yes

2. To be referred to the Reporter or not? Yes

3. Whether the Judgment should be reported in the Digest? Yes

J U D G M E N T

1. In this Petition under Article 226 of the Constitution of India the prayer is for the issuance of an appropriate writ,

direction or order staying the recovery of the entire demand of the impugned tax till the disposal of the Petitioner's Appeal pending before the Additional Commissioner-IV, Department of Trade and Taxes, Government of Delhi.

2. The facts in brief are that for Assessment Year (AY) 2003-04, vide Assessment Order dated 30.3.2005 a Demand of Rs.5,80,09,272/- under the Local Act and Rs.9,88,41,922/- under the Central Act stood assessed. After a Review, the Demand was reduced to Rs.4,30,19,815/- under the Local Act and Rs.2,79,43,711/- under the Central Act. The Review Order was appealed against before the First Appellate Authority who passed an Order under Section 43(5) of the repealed Delhi Sales Tax Act, 1975 (for the sake of brevity 'DST Act') directing the Appellant/Petitioner to deposit a sum of Rs.4.20 crores under the DST Act and Rs.14.78 lacs under the Central Act; only the latter amount was deposited. So far as direction to deposit Rs.4.20 crores is concerned the Appellant/Petitioner had approached the Appellate Tribunal, Value Added Tax, Delhi for relief. It was inter alia contended that the financial condition of the Petitioner/Appellant was very poor and payment of such a huge amount would mean virtually throwing the Petitioner out of trade.

In the present Petition it has been submitted “that the financial condition of the petitioner is not very strong. Pre-deposit of such a huge amount shall put the Petitioner into financial hardship”. The Tribunal noted that although learned counsel for the parties had addressed arguments on the merits of the Appeal, the only question before the Tribunal pertained to the deposit of tax as a pre-condition for maintaining the Appeal before the First Appellate Authority:Additional Commissioner-IV. The Tribunal took the view that keeping the financial position of the Petitioner in perspective the Order dated 2.2.2006 by the First Appellate Authority should be modified to the extent that it shall entertain the Appeal if the Appellant deposits Rs.2 crores within a period of thirty days, i.e., on or before 16.9.2006. It is this direction that has been assailed before us by means of this writ petition.

3. At the hearing Mr. Lakshmi Kumaran, learned counsel for the Petitioner, had asserted that even if it is assumed that the Petitioner has sufficient liquidity to make the deposit of the Rs.2 crores as per the direction of the Tribunal, this direction was not in consonance with the law and hence ought to be set aside by this Court. He has further contended that the entire Demand pertaining to of Rs.4,30,19,815/- under the DST Act was

unsustainable under the statute and was, therefore, disputed in toto. This being the position the said sum, or Rs.4.20 crores, or Rs.2 crores, could not be set-down as a pre-condition for entertaining the Appeal. Mr. Lakshmi Kumaran has vociferously argued that financial hardship is not a consideration under the Sales Tax laws as it indubitably is under the Excise and Customs statutes. His contention is that if a sum is disputed then its deposit cannot be made a pre-condition for entertaining the Appeal.

4. On behalf of the Revenue Shri H.L. Taneja has fervently argued that we should abjure from going into the merits of the case; that as against the Demand of Rs.4,13,19,815/- under the DST Act the Petitioner is now required to deposit Rs.2 crores only, which is most reasonable. Reliance has been placed by Mr. Taneja on *State of Punjab -vs- Punjab Fibres Ltd.*, [2005] 139 STC 200 where it has been observed that if the language is clear and unambiguous Courts ought not to grant relief solely on sympathetic considerations. This decision, however, militates against the Revenue for the reasons that there is a distinction, difference and divergence between the provisions of the Sales Tax Act and Delhi Value Added Tax Act, 2004 (for the sake of

brevity 'DVAT Act') on the one hand, and the Customs and Excise Acts on the other. In the latter financial hardship is a consideration, whereas in the former the only pre-condition is the deposit of amounts in dispute, by the Appellant. Mr. Taneja has thereafter drawn our attention to ***Novopan*** *India Ltd., Hyderabad -vs- Collector of Central Excise and Customs*, 1994 Supp(3) SCC 606 which, in our opinion, has not been properly understood. The general rule is that while interpreting fiscal statutes benefit of doubt or ambiguity must be given to the assessee. In ***Novopan*** the Court had encountered an exception or exemption provision and it is in this context that it had been enunciated that the advantage of ambiguity or doubt must go to the State. In other words, any exception to the general rule would be available only if it is clearly and unequivocally in favour of the assessee. In order to counter the argument Mr. Taneja has also made a futile effort to garner support from *Balvant N. Viswamitra -vs- Yadav Sadashiv Mule (Dead) through LRs*, (2004) 8 SCC 706. However, in that case it was found that the decree which was at the fulcrum of the dispute could not be described as a nullity by any stretch of the imagination. In order to arrive at such a conclusion the Court must perforce weigh every facet of the merits of the case and it is this very exercise that Mr. Taneja

would like us to avoid.

5. The decision of this Court in ***Vijay Power*** *Generators Ltd. -vs- Commissioner of Sales Tax*, [2000] 120 STC 377 has been relied upon by the learned counsel for both the parties. The Bench comprising Arijit Pasayat and D.K. Jain, J., as their Lordships then were, reiterated the well-entrenched legal principle that there is no inherent or constitutional right to file an appeal bestowed on any person; it is the creation of a statute and must be construed strictly. Therefore, it is open to the Legislature to circumscribe and curtail the right to prefer an appeal by imposing whichever fetters are considered appropriate by it. Accordingly, the requirement for the discharge of a liability as a pre-condition of the hearing of the appeal is validly imposable. In ***Prince Plastics*** *& Chemical Industries -vs- Commissioner of Sales Tax*, [2003] 131 STR 372 the Bench presided over by Justice Dalveer Bhandari, as his Lordship then was, had also articulated this very position in the following words:-

> 25. Despite having a good case a party may receive an unfavourable order/judgment. It may then not only suffer the discomfort of taking steps to have the order corrected in appeal, but may additionally have to comply with onerous pre-conditions for the hearing of the

appeal. In **Shyam Kishore** -vs- Municipal Corporation of Delhi, (1993) 1 SCC 22, somewhat, similar pre-conditions for the disposal of an appeal against an assessment order had come up for consideration before the honourable Supreme Court. Under the MCD Act an appeal against the assessment cannot be heard without pre-deposit of the tax. It was held that the appellate authority has no jurisdiction to waive the condition of deposit or stay the collection of tax pending disposal of the appeal. The Apex Court also held that despite these stringent requirements, the remedy of an appeal was nonetheless an alternative remedy thereby discouraging the invocation of extraordinary powers of the High Court under Articles 226 and 227 of the Constitution. As we have already mentioned, the impugned Rules merely implement this settled principle of law. In ***Shyam Kishore*** the plea that the provision for deposit of duty or penalty pending appeal whittles down the appellant's right of appeal and is, therefore, *ultra vires* did not find favour with the honourable Supreme Court. The Court relied on its previous observations in Vijay Prakash D. Mehta -vs- Collector of Customs (Preventive), Bombay [1989] 72 STC 324(SC) : (1988) 4 SCC 402, viz., “right to appeal is neither an absolute right nor an ingredient of natural justice the principles of which must be followed in all judicial and quasi-judicial adjudications. The right to appeal is a statutory right and it can be circumscribed by the conditions in the grant”. This position was once again reiterated in *Gujarat Agro Industries Co. Ltd. -vs-*

Municipal Corporation of the City of Ahmedabad, AIR 1999 SC 1818. It was again articulated in *State of Haryana -vs- Maruti Udyog Ltd.*, [2001] 124 STC 285(SC) : AIR 2000 SC 2941 in the context of sales tax legislation, in these words:

> "There cannot be any dispute that right of appeal is the creature of the statute and has to be exercised within the limits and according to the procedure provided by law. It is filed for invoking the powers of a superior court to redress the error of the court below, if any. No right of appeal can be conferred except by express words. An appeal, for its maintainability, must have a clear authority of law. Sub-section (5) of section 39 of the Act vests a discretion in the appellate authority to entertain the appeal if it is filed within sixty days and the amount of tax assessed along with penalty and interest, if any, recoverable from the persons has been paid. The aforesaid restriction is subject to the proviso conferring discretion upon the appellate authority to dispense with the deposit of the amount only on proof of the fact that the appellant was unable to pay the amount. Before deciding the appeal, the appellate authority affords an opportunity to the party concerned to either pay the amount or make out a case for the stay in terms of proviso to sub-section (5) of section 39 of the Act. Once the conditions specified under sub-section (5) of section 39 are complied with, the appeal is born for being disposed of on merits

after hearing both the sides".

This dicta is not confined only to taxation matters and applies with equal force even to civil appeals, as would be obvious on a reading of the decision in *Kondiba Dagadu Kadam -vs- Savitribai Sopan Gujar*, AIR 1999 SC 2213.

6. Thereafter in the context of Section 43(5) of the DST Act ***Vijay Power*** specifically held that in exercising the discretion contained in the said provision the concerned authority has only to consider (a) the existence of a prima facie case in favour of the assessee, (b) balance of convenience qua the deposit or otherwise, (c) irreparable loss, if any, to be caused in case stay is not granted and (d) safeguard of public interest. This discretion has to be exercised according to law, reason and justice and not as a result of private opinion or humour or arbitrariness. Moreover, all these factors should co-exist as they are of equal importance. In ***Mehsana Dist. Co-op Milk P.U.Ltd. -vs- Union of India,*** 2003 (154) ELT 347, the Apex Court had remanded the matter back for reconsideration to the Appellate Authority since the prima facie merits had not been satisfactorily addressed whereas the prima facie balance of convenience had apparently been concentrated upon. ***Vijay Power*** had been

assessed to extra demands of Rs.2,34,93,150 and Rs.1,43,44,384/- under the DST Act and the Central Act respectively. In appellate proceedings a direction had been made for deposit of Rs.20,00,000/- and Rs.5,00,000/- respectively and in Revision this was reduced to Rs.15,00,000/- and Rs.3,00,000/- respectively. After articulating the above enunciation of the law the Division Bench stated that no modifications to the Order were called for. In ***Jagannath*** *Dudadhar -vs- Commissioner of Sales Tax*, 2004 136 STC 235 the Division Bench presided over by Justice D.K. Jain, as his Lordship then was, reiterated that while exercising powers under the proviso to Section 43(5) what is required to be seen is whether (a) there is a prima facie case involving grant of full stay; (b) the balance of convenience qua deposit or other wise and (c) irreparable loss, if any, would be caused to the appellant in case stay is not granted. It was further observed that the Appellate Authority must be mindful that the condition of pre-deposit should not be so stringent as to be incapable of being complied with. The Appellate Tribunal, Sales Tax, Delhi had directed the Petitioner to make a pre-deposit of Rs.3,21,00,000/- in cash and for the furnishing of a surety for Rs.1,87,40,000/-, thus aggregating to Rs.5,08,40,000/-. The Bench did not reduce the amount, but permitted credits of Rs.46,50,000/- lacs which

had been deposited in the Court and Rs.80,00,000/- which was indisputably due as refunds, to be deducted from the quantum of the amount directed as the pre-deposit. In ***J.N.Chemicals Pvt Ltd. -vs- CEGAT,*** 1991 (53) ELT 543, the Division Bench of the Calcutta High Court opined that since a judgment existed in favour of the appellant on all fours, the power to dispense with the pre-deposit requirement ought to have been exercised. This was also the approach taken by the Division Bench of this Court in *Keramos -vs- CEGAT, New Delhi,* 2003 (153) ELT 301. In similar vein another Division Bench of this Court had found it unreasonable to require pre-deposit of the tax where the liability was initiated and founded on a palpably time-barred show-cause notice. The same Division Bench ordered complete waiver of pre-deposit in CW(P) 4949/1997 titled *Monika Electronics Ltd. -vs- Union of India***,** decided on 23-2-2000, keeping the existence of a judgment favourable to the Appellant in perspective, which judgment was not applied by the Tribunal. In *ITC Ltd. -vs- Commissioner (Appeals), CUS. & C. EX. MEERUT-I,* 2005 (184) ELT 347 the Division Bench of the Allahabad High Court has opined that as soon as the existence of a strong prima facie case on merits is disclosed, it would cause undue hardship to the appellant to require it to make the pre-deposit, regardless of the

fact that the appellant enjoyed a good financial condition.

7. In CW Nos. 17214/2006, 17513/2006 and 17616/2006 titled *Kuber Tobacco Products (P) Ltd. -vs- Commissioner of Value Added Tax* decided on 27.11.2006 vires of Section 43(5) of the DST Act had been challenged. The Division Bench repulsed this assault. It held that the extraordinary powers contained in Article 226 of the Constitution of India ought not to be employed to circumvent the making of the pre-deposit. The decisions in *State of Bombay -vs- Supreme General Films Exchange Ltd.*, AIR 1960 SC 980, *Anant Mills Co. Ltd. -vs- State of Gujarat*, AIR 1975 SC 1234 and *M/s. Shanti Fragrances -vs- Union of India*, [2006] 144 STC 529(Delhi) were noted.

8. It would be improper for us to ignore the fact that the Legislature has considered it appropriate to make a departure from the system established under the Customs and Excise and Municipal statutes, all of which require that the amount assessed as tax must be deposited as a pre-condition for the consideration and hearing of an appeal. So far as the Sales Tax or the DVAT statutes are concerned an appellant must deposit the amount of tax which is not disputed by the dealer/appellant. The Appellate

Authority may thereafter reduce or waive the amounts in controversy and may at best require the furnishing of a security by the applicant/dealer.

9. While exercising discretion to waive or reduce the tax and penalty challenged by the appellant the Appellate Authority must satisfy itself of the existence or absence of a prima facie case set-up by the appellant, in whose favour the balance of convenience must lie, and who would be visited with irreparable loss unless interim orders are passed; it should always be mindful that public interest or interests of the Revenue are not endangered. So far as the Sales Tax and DVAT Acts are concerned it appears to us that safeguarding the interests of the Revenue is adequately achieved through the requirement of the furnishing of security or a surety. It is in this context that Mr. Taneja has drawn attention to the oft-quoted decision in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal -vs-* ***Dunlop India*** *Ltd.*, AIR 1985 SC 330, the relevant portion of which reads as follows:-

> 7. Now coming to the facts of the present case,the respondent, Dunlop India Limited is a manufacturer of tyres tubes and various other rubber products. By a notification dated April 6, 1984 issued by the Government of India, Ministry of Finance

(Department of Revenue) in exercise of the powers conferred by R.8(1) of the Central Excise Rules, 1944, tyres, falling under Item No.16 of the First Schedule to the Central Excise and Salt Act, 1944, were exempt from certain percentage of excise duty to the extent that the manufacturers had not availed themselves of the exemption granted under certain other earlier notifications. The Department was of the view that the Company was not entitled to the exemption as it has cleared the goods earlier without paying central excise duty, but on furnishing Bank Guarantees under various interim orders of courts. The Company claimed the benefit of the exemption to the tune of Rs.6.05 crores and filed a writ petition in the Calcutta High Court and sought an interim order restraining the central excise authorities from the levy and collection of excise duty. The learned Single Judge took the view that a prima facie case had been made out in favour of the Company and by an interim order allowed the benefit of the exemption to the tune of Rs.two crores ninety three lakhs and eighty five thousand for which amount the company was directed to furnish a Bank Guarantee, that is to say, the goods were directed to be released on the Bank Guarantee being furnished. An appeal was preferred by the Assistant Collector of Central Excise under clause 10 of the Letters Patent and a Division Bench of the Calcutta High Court confirmed the order of the learned single judge, but made a slight modification in that the Collector of Central Excise was

given the liberty to encash 30% of the Bank Guarantee. The Assistant Collector of Central Excise has preferred this appeal by special leave. By our interim order dated Nov.15, 1984, we vacated the orders granted by the learned single judge as well as by the Division Bench. We gave two weeks' time to the respondent Company to file a counter. No counter has, however, been filed. Shri F.S. Nariman, learned counsel, however appeared for the respondent. We do not have the slightest doubt that the orders of the learned single judge as well as Division Bench are wholly unsustainable and should never have been made. Even assuming that the company had established a prima facie case, about which we do not express any opinion, we do not think that it was sufficient justification for granting the interim orders as was done by the High Court. There was no question of any balance of convenience being in favour of the respondent-Company. The balance of convenience was certainly in favour of the Government of India. Governments are not run on mere Bank Guarantees. We notice that very often some courts act as if furnishing a Bank Guarantee would meet the ends of justice. No governmental business or for that matter no business of any kind can be run on mere Bank Guarantees. Liquid cash is necessary for the running of a Government as indeed any other enterprise. We consider that where matters of public revenue are concerned, it is of utmost importance to realise that interim orders ought not to be granted merely because

> a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of the making of an interim order and there should not be the slightest indication of a likelihood of prejudice to the public interest. We are very sorry to remark that these considerations have not been borne in mind by the High Court and interim order of this magnitude had been granted for the mere asking. The appeal is allowed with costs.

These views are also to be found in Siliguri Municipality -vs- Amalendu Das**,** AIR 1984 SC 653; *State of Madhya Pradesh -vs- M/s. M. Vyavsaya & Co.*, AIR 1997 SC 993 and *Upadhyay & Co. -vs- State of U.P.*, (1999) 1 SCC 81.

10. Caution must, however, be sounded that the decision was rendered in respect of Central Excise, the regime of which is vitally different to that of Sales Tax or DVAT statutes. However, the principle that is beyond controversy is that merely because sums of money have to be deposited as a pre-condition for entertaining an appeal the balance of convenience or irreparable loss would not automatically or *per se* be shifted in favour of the assessee. Accordingly, in all fiscal statutes even in the absence of an overt expression or articulation, the twin considerations of balance of convenience and irreparable loss are manifest in the

concept of undue financial hardship. Without this synthesising, the decisions in ***Vijay Power*** and ***Jagannath*** would run aground as this would be *per incuriam* of ***Dunlop India*** being irreconcilable therewith. Before venturing on we must recall that in ***Dunlop India*** the Apex Court had observed poignantly that "in the case of indirect taxation where the burden has already been passed on to the consumer no interim relief should be given to the manufacturer dealer or the like."

11. In *Vijay Prakash D. Mehta -vs- Collector of Customs (Preventive), Bombay*, 1989(72) STC 324 : AIR 1988 SC 2010 Section 129E of the Customs Act was in consideration. The Apex Court observed that the right to appeal is neither an absolute right nor an ingredient of natural justice and these principles must be followed in all judicial and quasi-judicial adjudications. Since all relevant factors had been kept in perspective by the Tribunal, the Apex Court found no merit in the appeal before it.

12. Mr. Lakshmi Kumaran has contended that the existence of a prima facie case is so evident in the Petitioner's favour as to render all other considerations superfluous. This argument is predicated on Rule 11 of the DST Rules, 1975 which prescribes

that in calculating its taxable turnover, a registered dealer may deduct from his turnover sales made to any undertaking supplying electrical energy to the public in Delhi under a licence or sanction granted or deemed to have been granted under the Indian Electricity Act, 1910 in respect of goods for use in Delhi by it directly in the generation or distribution of electrical energy in Delhi. He has drawn assistance from the decision in Suresh Jindal -vs- BSES Rajdhani Power Ltd. in LPA No.256/2006 decided on 20.2.2006. The Division Bench presided over by Chief Justice Markandeya Katju, as his Lordship then was, had ruled that since the respondent had applied for a licence under Rule 10(2) of the Delhi Electricity Reforms (Transfer Scheme) Rules 2001 within sixty days of 1.7.2002, it was clothed with all the powers of a licensee under the Indian Electricity Act, 1910. It is Mr. Lakshmi Kumaran's contention that this observation has palpably escaped the attention of the Commissioner. On the other hand Mr. Taneja has retorted by submitting that the factual matrix in that case was altogether different to the present case. In our view this argument of Mr. Lakshmi Kumaran is not so irresistible as would brook no further consideration. It touches upon the merits of the case. It is not one which must be accepted no sooner it is stated. This question will, no doubt, be considered at the time when the

Appeal is heard for final disposal. This, however, can happen only if orders of pre-deposit are complied with. It is in these circumstances that we do not consider it appropriate, at this stage of the proceedings, to go into the intricate question of of which of the statutes, i.e., DST Act or DVAT Act apply. The Order in Original was passed on 31.3.2005 and the Appeal/Objections were filed in May, 2005 after the coming into force of the DVAT Act on 1.4.2005.

13. Section 43(5) of the DST Act prescribes that no appeal against an Assessment Order shall be entertained by the Appellate Authority unless such appeal is accompanied by satisfactory proof of the payment of the tax or penalty, provided that such Appellate Authority may entertain the Appeal without such payment on the appellant providing a security for such payment or for any lesser amount. The appellant must, however, pay the amount of admitted tax. The DST Act stands repealed by virtue of Section 106 of the DVAT Act with effect from 1.4.2005. In the present regime, as established by the DVAT Act, 'Objections' under Section 74(1) can be filed by a person who is dissatisfied with an assessment made under the Act, provided that such action cannot be entertained unless the amount of tax,

interest of penalty assessed that is not in dispute has been paid, failing which the 'Objections' shall be deemed to have not been filed (The language is lifted from the statute). The discretion to waive pre-deposit amount of tax, interest or penalty that is not in dispute has not been reposed in the Commissioner. This will be evident on a reading of Section 76 of the DVAT Act which governs the functioning of the Appellate Tribunal. Section 76(1)(4) prescribes that no appeal against an assessment shall be entertained by the Appellate Tribunal unless the appeal is accompanied by satisfactory proof of the payment of the amount in dispute and any other amount assessed as due from the person; provided that the Appellate Tribunal may, if it thinks fit, entertain an appeal without payment of some or all of the amount in dispute, on the appellant furnishing in the prescribed manner security for such amount as it may direct; provided further that no appeal shall be entertained by the Appellate Tribunal unless it is satisfied that such amount as the appellant admits to be due from him has been paid. This creates an anomalous position in that at the second tier of appeal, i.e., before the Appellate Tribunal, whilst the amount admitted to be due by the appellant must be deposited, [similar to the 'Objections' stage] the Appellate Tribunal may waive 'the amount in dispute'. The

repeated use of the word 'dispute' in both situations is confusing and ought to have been avoided by the Legislature. However, it can have no meaning other than the total or entire amount found payable by the dealer who had filed 'Objections' under Section 74 (1) of the DVAT Act.

14. The Customs Act, 1962 provides for filing of an appeal to the Commissioner (Appeals) under Section 128. Thereafter, Section 129 is the fasciculous concerning the functioning of the next authority, namely, Custom, Excise and Service Tax Appellate Tribunal. Section 129E of the Customs Act mandates that the person desirous of appealing against an order demanding duty, interest or penalty as the case may be shall, pending the Appeal deposit any or all such amount. Thereafter, the proviso dedicates discretion with the Commissioner (Appeals) or the Appellate Tribunal as the case may be hearing the Appeal to dispense with such deposit as it may deem fit mindful always that the interest of the Revenue are adequately safeguarded. The discretion is severely and pointedly circumscribed by and dependent upon the formation of the opinion by the Commissioner (Appeals) or the Appellate Tribunal that the pre-deposit of duty, interest or penalty levied would cause undue hardship to the appellant and

thereby render the remedy illusory. The provisions of Section 35F of the Central Excise Act, 1944 are in *pari materia* with Section 129 E of the Customs Act. This important factor, i.e., likelihood of undue hardship being visited on the appellant, is absent in the Sales Tax Act. Does this inexorably lead to the conclusion that since this feature is conspicuously absent from the Sales Tax statutes the aspect of the financial health of the appellant is altogether irrelevant. If the answer is in the affirmative, then Mr. Lakshmi Kumaran is correct in contending that even though the Appellant may presently be enjoying financial well being and possesses sufficient liquidity to deposit the entire sales tax demand, this would not be a relevant consideration. In fact, since financial hardship is deliberately not one of the concomitants necessary for the grant of interim relief in appeals, the statutory indication is that sales-tax demands must be deposited as the rule or norm, and their interdictment is the exception. The observations in ***Dunlop*** are of great relevance in Sales Tax disputes.

15. It appears to us that the answer is to be found in ***Vijay Power***, ***Jagannath*** and ***Prince Plastics*** dictums. It would not be sanguine to assume that the fortunes of a litigant diminish as it

unsuccessfully progresses through the tiers and ladders of appeals. Certainly the balance of convenience normally should shift in favour of the respondent in the appeal, which in this case is the Sales Tax Department. Courts should not falter from safeguarding public interests. When stay orders are readily given the direct result is that appeals are filed even in cases where the likelihood of success is slender. Irreparable loss, akin to balance of convenience of which it is an important and integral facet, also veers in favour of the respondent as a litigant ascends the jural hierarchy. This is especially so where moneys have to be paid to the State since refunds or adjustments are easy to effectuate. The reverse position in fact offends the ***Dunlop*** dictum. What remains to be cogitated upon is the existence of a prima facie case, and in this regard it seems to us that the assailed Order must be devoid of jurisdiction or be so palpably incorrect as to demand and dictate interference. It must be perverse, which means that the vital question brooks no two opinions. Perversity cannot cohabit with dialectic debate. If the merits of a case call for careful consideration, as it does in the matter in hand, a prima facie case cannot exist. Keeping these factors in mind, as also the absence of any requirement for consideration of financial hardship, we find no reason to interfere in the operation of the

impugned Orders. The Writ Petition is accordingly dismissed but we refrain from imposing costs.

C.M. 11118/2006

16. Interim Orders dated 8.9.2006 are recalled. The application is dismissed.

(VIKRAMAJIT SEN)
JUDGE

(J.P. SINGH)
JUDGE

February 15, 2007
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